

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION**

Stephen D. Swearingen,)	
Petitioner,)	
vs.)	No. 04-3542-CV-S-FJG
Robert McFadden, et al.,)	
Respondents)	

ORDER AND JUDGMENT

Pursuant to the governing law and in accordance with Local Rule 72.1 of the United States District Court for the Western District of Missouri, Mr. Swearingen's petition for a writ of habeas corpus (Doc. #1, filed November 29, 2004) was referred to the United States Magistrate for preliminary review under the provisions of 28 U.S.C. § 636(b).

The United States Magistrate completed his preliminary review of the petition herein for a writ of habeas corpus and submitted a report and recommendation (Doc. #4, filed November 30, 2004) recommending that the petition for a writ of habeas corpus be dismissed without prejudice.

Petitioner filed pro se exceptions to the report and recommendation of the Magistrate (Doc. #6, filed December 7, 2004) in which he continues to challenge his sentence. He contends that the time to file a § 2255 motion has passed, and that he is entitled to adjudicate his claim under the savings clause because he is actually innocent of the enhanced portion of his federal sentence.

Having fully reviewed the record de novo, the Court agrees with the Magistrate that the petition should be dismissed on the grounds that it is not properly before this Court. Regardless of petitioner's assertions, he has failed to establish that the 28 U.S.C. § 2255 remedy is inadequate or ineffective to address his complaints. It should be noted that in

United States v. Booker, 125 S. Ct. 738 (U.S. 2005), the Supreme Court held that the federal sentencing guidelines are not mandatory, but rather, advisory. Therefore, this dismissal is without prejudice to petitioner's right, if any, to bring a Booker challenge in the sentencing court. It should be noted, however, that whether Booker will be applied retroactively is an unsettled area of the law. Most courts considering the issue have denied relief under § 2255, finding that Booker is not retroactive. E.g., McReynolds v. United States, 397 F.3d 479 (7th Cir. 2005); In re Anderson, 396 F.3d 1336 (11th Cir. 2005).

Based on the file and records in this case, it is concluded that the findings of fact, conclusions of law, and proposed actions of the Magistrate are correct and should be approved. It is therefore ordered and adjudged that:

- (1) Petitioner's exceptions are overruled;
- (2) Petitioner is denied leave to proceed in forma pauperis; and
- (3) This petition for a writ of habeas corpus is dismissed without prejudice.

/s/ Fernando J. Gaitan, Jr.
United States District Judge

Dated: May 13, 2005
Kansas City, Missouri